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No. 87-1837

IN THE
Supreme Court of the United States
October Term, 1987

PARKVIEW ASSOCIATES,

Appellant,

v.

CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK and CIVITAS CITIZENS, INC.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

ROBERT S. DAVIS
BERLE, KASS & CASE
Counsel for Appellee
Civitas Citizens, Inc.
45 Rockefeller Plaza
New York, NY 10111
(212) 765-1800

Of Counsel:
FLORENCE A. FREDMAN

Dick Bailey Printers, 203 Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellee Civitas Citizens, Inc. ("Civitas"), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully moves this Court to dismiss the appeal herein on the ground that no state statute was upheld against a constitutional challenge below or, in the alternative, to affirm the judgment of the New York Court of Appeals on the ground that it is manifest that the federal question on which the decision of the cause depends is so insubstantial as not to need further argument.

PRELIMINARY STATEMENT

This is an appeal from a final judgment entered by the Court of Appeals of the State of New York on February 9, 1988, holding that the City of New York was not estopped from revoking an erroneously issued building permit that violated longstanding zoning regulations, although the property owner had already constructed a substantial portion of the building.

Appellant Parkview Associates ("Parkview") owns property located on East 96th Street, between 90 feet and 190 feet east of Park Avenue, in the Borough of Manhattan, upon which it has constructed a partially-completed 31-story residential building. This building violates the height restrictions of the Special Park Improvement District ("PI District") created by the Zoning Resolution of the City of New York (the "Zoning Resolution"), which limit building heights within the PI District to the lesser of 210 feet or 19 stories. The zoning enactments of the New York City Board of Estimate have at all times since 1973 unambiguously placed the boundary of the PI District at 96th Street 150 feet east of Park Avenue, thereby including 60 feet of Parkview's site. Nevertheless, in November 1985 Parkview obtained a building permit that authorized construction of a 31-story building. The permit was erroneously issued by the New York City Department of Buildings (the "Buildings Department" or "Department of Buildings") at a time when the published version of the applicable zoning map omitted the notation "150" and thereby incorrectly appeared to place the boundary of the PI District only 100 feet east of Park Avenue.[1]

1. Zoning district boundaries are defined by metes and bounds in resolutions adopted by the Board of Estimate. The boundaries are then drawn on maps, which are made available to the public as part of the Zoning Resolution. The maps, like the text of the Zoning Resolu-

On July 22, 1986, upon learning of its mistake, the Buildings Department revoked Parkview's permit and ordered Parkview to stop work above the 19th floor of the building. Parkview appealed this determination to the New York City Board of Standards and Appeals which, on October 14, 1986, affirmed the determination of the Buildings Department, specifically finding that the location of the PI District boundary 150 feet east of Park Avenue was "clearly spelled out" in the relevant legislation.

Parkview then instituted a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") seeking to overturn the revocation of its building permit. The Article 78 petition alleged that Parkview's building was permitted by the Zoning Resolution or, if it was not a permissible structure, that the City was estopped from enforcing the requirements of the Zoning Resolution by its mistaken issuance of a building permit. The petition also claimed that the revocation of the building permit effected an unconstitutional taking without just compensation or due process, in violation of Parkview's rights under the fifth and fourteenth amendments to the Constitution.

tion, are updated when changes are made by the Board of Estimate in accordance with the City's Uniform Land Use Review Procedure ("ULURP") established by §197-c of the New York City Charter. Section 197-c sets forth uniform procedures for "changes, approvals, contracts, consents, permits or authorizations [of proposals and applications] respecting the use, development or improvement of real property subject to city regulation." City Charter §197-c(a). The procedure prescribes the time period within which the Department of City Planning must forward an application to the appropriate community or borough board, following which the board holds public hearings and makes a decision. The application is then reviewed and acted upon by the City Planning Commission, and then, following another public hearing, by the Board of Estimate. Proposed zoning amendments are accompanied through ULURP by a diagram, prepared by the Department of City Planning, that shows the area proposed to be rezoned.

The Supreme Court, New York County, the court of first instance, dismissed Parkview's petition. The court determined that the structure Parkview seeks to complete on its property violates the PI District regulations and that, as a matter of law, the issuance of a permit that violated the Zoning Resolution could not estop the City from enforcing its zoning laws. The Appellate Division, First Department unanimously affirmed the judgment of the Supreme Court, New York County, adopting the Supreme Court's opinion.

The Court of Appeals of the State of New York, having granted Parkview permission to appeal from the Appellate Division decision, affirmed the decisions below, holding that estoppel was not available against a municipality discharging its statutory duties, and that, in any event, the rare exception to the unavailability of estoppel against a governmental entity was inapplicable in this case, "where reasonable diligence by a good-faith inquirer would have disclosed the true facts and the bureaucratic error." 71 N.Y.2d 274, 279 (1988).

QUESTION PRESENTED

May a municipality constitutionally enforce the duly enacted and unambiguous provisions of its zoning ordinace by requiring a builder to remove the noncomplying portion of a building that was constructed pursuant to an erroneously issued, invalid building permit that violated the applicable zoning regulations?

COUNTERSTATEMENT OF THE CASE

A. *The Zoning Chronology*

On April 23, 1973, the Board of Estimate enacted a resolution[2] establishing a special zoning district known as the Special Park Improvement District. The P I District imposed a height limitation of the lesser of 210 feet or 19 stories on all buildings within its boundaries. As initially enacted, this district extended eastward to a line 150 feet east of Park Avenue for its entire length, including the block between 95th and 96th Streets, on which Parkview's property is located. The 150-foot boundary was clearly shown on maps and copies of the Zoning Resolution available through the end of 1982. The map, which is denominated Zoning Map 6b in the looseleaf version of the Zoning Resolution published by the City, included the notation "150" next to 95th Street to delineate the 150-foot extent of the PI District east from Park Avenue.

On March 3, 1983, the Board of Estimate enacted a resolution that both reduced the size of the PI District and amended the zoning of the area being removed from that District.[3] From 88th Street to the middle of the block between 95th and 96th Streets, the eastern boundary of the PI District was moved 50 feet west. Parkview's property was not affected by that change because the new boundary, which was 100 rather than 150 feet east of Park Avenue,

2. Parkview's repeated use of the term "enabling resolution" to describe the Board of Estimate's legislative enactments, Jurisdictional Statement at 6, is misleading. Pursuant to §§197-c and 200 of the City Charter, amendments to the Zoning Resolution are enacted by resolutions passed by the Board of Estimate. In other words, the Board's resolutions constitute enacted law and not mere "enabling" actions.

3. The Board of Estimate resolution simultaneously rezoned the area to be removed from the PI District from R10 to the lower density, smaller scale, and therefore more restrictive, R8.

ran north only to the midline of the block between 95th and 96th Streets. It stopped short of Parkview's property ad therefore left that property within the PI District.

A new edition of Zoning Map 6b was published by the Department of City Planning, reflecting the new 100-foot depth of the PI District south of the centerline of the block between 95th and 96th Streets. The borderline of the PI District north of the centerline of that block, including the PI District's intersection with Parkview's property, appeared as it had on earlier versions of the Zoning Map, indicated by a shaded area or "tone" that extended beyond the new 100-foot line. On the revised loose-leaf version of Zoning Map 6b, the "150" notation at 95th Street was omitted to reflect the new 100-foot measurement at that street.[4] The shading on the new map continued to indicate, as it had on the old, that the PI District at 96th Street extended beyond the 100-foot line. The Department of City Planning somehow neglected to replace at 96th Street the "150" notation that had previously been at 95th Street, to make clear that the boundary of the PI District at 96th Street remained 150 feet east of Park Avenue.[5]

This oversight was first remedied in a diagram prepared by the Department of City Planning in connection with a 1985 zoning action. The diagram, which carried a ULURP certification date of March 18, 1985, bears the notation "150" at 96th Street. This diagram was published in connection with a set of zoning amendments creating a new R8B zoning district, as part of a continuing

4. Pursuant to §76-131(c) of the Zoning Resolution, a zoning district boundary line in a residential district is considered to be 100 feet from the street if no specific numerical notation appears.

5. Exactly how the error occurred is unknown, since no fact-finding hearing was conducted below.

effort to restrict the scale of development in certain areas of the east side. The City Planning recommendation accompanying and incorporating this diagram was approved by the Commission on July 22, 1985 and was enacted by the Board of Estimate on September 19, 1985. In November of 1985, the Department of City Planning distributed a revised version of Zoning Map 6b that also included the "150" notation for 96th Street.[6]

B. *Parkview's Construction of a Noncomplying Building*

Parkview's property is a rectangular lot located on the south side of 96th Street between Park and Lexington Avenues. The lot stretches for 100 feet, from 90 to 190 feet east of Park Avenue. The Zoning Map in effect when an affiliate of Parkview purchased the property on July 15, 1982,[7] correctly showed the PI District Boundary to be 150 feet east of Park Avenue at 96th Street.

Parkview's New Building Application, dated July 27, 1985 and filed on August 7, 1985, proposed a building that rose 19 stories for the western 10-foot strip of the property (the portion within 100 feet of Park Avenue), and 31 stories for the remainder of the building, including the

6. This revised version of Map 6b was distributed in November 1985 in conjunction with the publication of a new edition of the entire loose-leaf Zoning Resolution. The revision did not reflect the September 19, 1985 amendment to Map 6b. A subsequent version of Map 6b issued by the Department of City Planning both reflected the September 19, 1985 amendment and included the "150" notation for 96th Street.

7. Parkview's argument that it is at an extreme corner of the PI District, Jurisdictional Statement at 6, attempts to obscure the fact that its 31-story building is out of character for construction in the vicinity. In fact, most of the other buildings in the vicinity do not exceed 19 stories.

portion within 150 feet of Park Avenue. The Department of Buildings approved Parkview's drawings for zoning purposes on August 12, 1985, and issued an excavation permit on September 24, 1985. Parkview commenced construction in October. On Novermber 21, 1985, the Department of Buildings issued a full building permit, and Parkview continued with construction of the building.

On November 7, 1985, after construction had commenced, the Department of Buildings informed Parkview that its approval was being revoked because the plans did not comply with the R8B zoning adopted in that area. Parkview's architect then reviewed the Department of City Planning diagram that had accompanied the R8B rezoning and that explicitly included the "150" notation at 96th Street, in order to ascertain that Parkview's property was not included in the rezoned area. In his response to the Department of Buildings, he pointed out that Parkview's property was not affected by that zoning amendment; as a result, the Department of Buildings reinstated approval of the plans.

C. *The Revocation of Parkview's Permit*

In June of 1986, at a meeting with staff of the Department of City Planning, Civitas's president learned that Parkview's construction within 150 feet of Park Avenue exceeded the height restrictions of the PI District. The Buildings Department, recognizing its mistake in approving the application, issued a stop work order on July 11, 1986 and invited Parkview to prove that the building was in substantial compliance with the Zoning Resolution. After considering and rejecting Parkview's arguments in favor of its interpretation of the PI District boundary line, the Commissioner continued the stop work order in effect and revoked approval of the plans on July 22, 1986 for

work above the 19th floor. Parkview appealed this determination to the Board of Standards and Appeals which ruled on October 14, 1986 that the PI District boundary, as "clearly spelled out" in the relevant Board of Estimate resolutions, was in fact located 150 feet east of Park Avenue at 96th Street, and affirmed the Buildings Department's action.

Parkview then sought relief from the determination of the Board of Standards and Appeals in this proceeding under Article 78 of the New York Civil Practice Law and Rules (CPLR). The City answered and counterclaimed, seeking an injunction ordering the removal of the offending building. Civitas sought, and was granted, permission to intervene as a respondent under CPLR §7802(d).

D. *The Decisions Below*

As is customary in an Article 78 proceeding, the Supreme Court, New York County (McCooe, J.) ruled without holding a fact-finding hearing, having considered only the petition, supporting affidavits, and legal memorandum submitted by Parkview, and the answers, affidavits and legal memoranda submitted by the City and by Civitas. The court dismissed Parkview's petition in its entirety and declined to rule on the counterclaim.

The Supreme Court held that the Zoning Resolution could only be interpreted to have set the boundary line for the PI District at 96th Street 150 feet east of Park Avenue at all relevant times, that the building permit was thus invalid when issued because it was contrary to the Zoning Resolution, and that, as a matter of law, Parkview could neither gain vested rights nor establish a claim of equitable estoppel by reliance upon such an invalid permit, regardless of its good faith. The court thus explicitly

declined to rule on, or even to hold a hearing with respect to, the factual issue of Parkview's asserted good faith. Slip opinion at 13; Jurisdictional Statement at 17a. The court also noted that Parkview's claims of an unconstitutional taking or deprivation of its property were not ripe, since Parkview had not sought a variance, which was a condition precedent to such claims,[8] and held that in any event the PI District regulations did not deprive Parkview of all reasonable economic uses of the property.

Parkview appealed the dismissal of its petition to the Appellate Division, First Department, which unanimously affirmed the dismissal of the petition, adopting Justice McCooe's opinion.

Parkview then sought to appeal the Appellate Division decision to the Court of Appeals as of right. The Court dismissed the appeal *sua sponte* on the ground that no substantial constitutional question was directly involved. Parkview then moved to appeal by leave of the court, which was granted. On February 9, 1988, the Court of Appeals affirmed the Appellate Division's decision, holding that the municipality could not be estopped from discharging its statutory duties, particularly "where reasonable diligence by a good-faith inquirer would have disclosed the true facts and the bureaucratic error." *Parkview Associates v. City of New York,* 71 N.Y. at 279. The court also noted that it was undisputed that "at the time the permit was issued the Department [of Buildings] erroneously interpreted amended Map 6b as changing the boundary on

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8. Parkview has conceded that a claim that the City's actions effect a taking without just compensation is premature pending a determination on its variance application. Jurisdictional Statement at 28 n.8.

96th Street to 100 feet," while "the boundary-height limitation applicable to Parkview . . . was and had always been 150-feet east of Park Avenue." *Id.* at 177.

When the Court of Appeals denied reargument on April 28, 1988, it also rejected by that action Parkview's express request that the court delete from its opinion the language, quoted above, requiring "reasonable diligence by a good-faith inquirer."

MOTION TO DISMISS

Appellee Civitas hereby moves to dismiss this appeal on the ground that no state statute was upheld against a constitutional challenge below.

Under 28 U.S.C. § 1257(2), this Court has appellate jurisdiction to review a decision, rendered by final judgment or decree of the highest state court that may pass on the question, upholding the validity of a state statute against constitutional challenge. *See, e.g., Lathrop v. Donohue,* 367 U.S. 820, 824 (1961). Although it has long been accepted that a state statute, for these purposes, need not be an act passed by the legislature of a state, *see Erznoznik v. City of Jacksonville,* 422 U.S. 205, 207 n.3 (1975); *Coates v. City of Cincinnati,* 402 U.S. 611 (1971); *King Mfg. Co. v. City Council of Augusta,* 277 U.S. 100 (1928), some act of a legislative character must have withstood constitutional challenge to trigger this Court's appellate review. *See Lathrop v. Donohue,* 367 U.S. at 824 ("the legislative character of the challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of jurisdiction").

A legislative act "looks to the future and changes existing conditions by making a new rule, to be applied

thereafter to all or some part of those subject to its power." *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908); *cf. District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (quoting *Prentis*). Parkview has not identified a single such prospective act that was upheld below, nor can it; no legislative act has affected its property since it was purchased in 1982. Not one of the three events upon which Parkview appears to base its claim, namely, the revocation of its building permit, the erroneous omission of the "150" notation in the 1983 Zoning Map, or the rectification of the 1983 error in 1985, is legislative in nature.

On the contrary, the revocation of Parkview's building permit by the Department of Buildings in 1986 is a classic example of a ministerial, administrative action. The grant or revocation of a particular building permit in accordance with existing regulations affects only one applicant with respect to only one permit and cannot be considered a legislative act. Nor can the inadvertent commission and subsequent correction of a clerk's or printer's error be considered legislative, as those actions could not amend the law. And, just as the 1983 error could not and did not change the boundary of the PI District at 96th Street, neither did the 1985 correction of the Zoning Map to reflect the true boundary effect any amendment.

A. *There Was No Legislative Map Change Affecting Parkview's Property In 1983*

1. The boundary of the PI District at 96th Street has always been located 150 feet east of Park Avenue.

There is no dispute that in 1982, when Parkview purchased the property, it was within the Special Park Improvement District. At that time, the entire eastern boun-

dary of the PI District was located 150 feet east of Park Avenue, as it had been since the creation of the District in 1973. Indeed, it is undisputed that the boundary line remained at that location and was properly indicated on the published zoning maps at the time Parkview's affiliate purchased the property in 1982 and at least until March 3, 1983. It is also beyond dispute that the zoning maps may be amended only by compliance with the provisions of City Charter §197-c, which require notice to the affected Community Board, review of any proposed zoning change by the City Planning Commission, and approval of any change by the Board of Estimate. None of these procedures were followed, so that even if an amendment of Zoning Map 6b affecting Parkview's property had been intended, it would have been ineffective.

The only amendment that has affected the PI District boundary in the vicinity of Parkview's property was the Board of Estimate resolution approved on March 3, 1983. That resolution, however, did not affect the property itself. It reduced the size of the PI District by moving its eastern boundary from 150 to 100 feet east of Park Avenue, but only from 88th Street to the midblock between 95th and 96th Streets, and it rezoned the area thus removed from the District from R10 to R8. It is clear from the text of the resolution, however, that neither of these amendments changed the zoning of any portion of the upper half of the block between 95th and 96th Streets, including Parkview's property.

Parkview argues, however, that a diagram, which was certified by the City Planning Commission on October 25, 1982, and which is referred to in the resolution adopted by the Commission and the Board of Estimate, indicates a change in the location of the boundary at 96th Street by

omitting the "150" notation at 96th Street. This argument must fail not only because it depends on a misreading of the diagram, but also because it mischaracterizes the purpose and authority of the diagram. The diagram, properly read, indicates that the location of the PI District boundary at 96th Street would not change. Moreover, the Board of Standards and Appeals held that the sole purpose of the diagram, and thus the only purpose for which it may be relied on, is to indicate the extent and nature of a proposed rezoning. The legend on the diagram notes that the area to be rezoned is enclosed within a dotted line. The dotted line does not go further north than the midblock between 95th and 96th Streets, indicating clearly and unambiguously that the PI District boundary would not be modified where it crossed Parkview's property 150 feet east of Park Avenue at 96th Street.[9]

Indeed, not a single City Charter requirement was met for amending a zoning district boundary: modification of the PI District boundary at 96th Street was never proposed by the Planning Commission, notice was never given to the Community Board or the public, and neither the Planning Commission nor the Board of Estimate ever voted on a resolution containing the change. A mere clerical error in the preparation of a diagram cannot effect a substantive change in the zoning scheme of New York City in derogation of the procedures established by the City Charter.

Parkview's response is to assert that the Board of Estimate must have ignored both the metes and bounds

9. Moreover, even if Parkview had been correct in asserting that the PI District boundary changed at 96th Street, its building would still have violated the applicable zoning, for it would then have been locaed in and violated the regulations of the more restrictive R8 district.

description contained in the text of its resolution and the restricted purpose of the diagram, and enacted the entire diagram, which lacks the "150" notation, as the zoning map. Parkview then relies on the convention set forth in Zoning Resolution §76-131(c) to assert that the boundary became 100 feet. This use of §76-131(c) is inappropriate, however, because it begs the question; the Board of Estimate never enacted a 100-foot dimension for the PI District boundary line at 96th Street. The location of the boundary was never modified by a legislative body competent to amend the Zoning Resolution, and a boundary duly enacted by the Board of Estimate cannot be changed either by a mapmaker's neglecting to add a dimension where one is required or by the application of an interpretive convention.

2. The issuance by the Department of City Planning of an erroneous map cannot amend the Zoning Resolution and is therefore not a legislative act.

The zoning maps issued by the Department of City Planning are simply codifications of the legislative enactments of the Board of Estimate. To allow "amendments" to be effected by the issuance of an incorrect map would give employees of the Department of City Planning *de facto* power to veto legislation either purposefully or by making mistakes.

Under New York law, distribution of an incorrect Map 6b by the Department of City Planning cannot amend duly enacted legislation any more than distribution of a statute book containing a typographical error can effectively amend a duly enacted statute. *People v. Hartwell,* 166 N.Y. 361 (1901) (matter inserted by publisher does not control interpretation of statute); *Whelan v. Warwick Valley Civic & Social Club,* 89 Misc.2d 577 (Sup.

Ct. Orange Co. 1977), *rev'd on other grounds,* 63 A.D.2d 646 (2d Dep't 1978), *aff'd,* 47 N.Y.2d 970 (1979). Federal law is to the same effect. *See United States v. Welden,* 377 U.S. 95, 98 n.4 (1964) (circulation by U.S. Government Printing Office of version of U.S. Code containing a typographical error cannot amend statute).

B. *The 1985 Correction of Map 6b Was Not a Legislative Action*

The issuance of a corrected map in 1985 was no more a legislative act than the issuance of the erroneous map had been in 1983. Neither effected a change in the location of a zoning district boundary. The 1985 City Planning Commission diagram showing the area removed from the PI District in 1983 as being rezoned from R8 to R8B corrected the clerical error that had been made on the 1983 version of Map 6b by restoring the "150" notation at 96th Street. This diagram, however, could not and did not change the boundary line at 96th Street. That boundary had been located 150 feet east of Park Avenue, unchanged since the creation of the PI District.

Similarly, the revised version of Zoning Map 6b distributed by the Department of City Planning in November 1985, which also contained the restored "150" notation at 96th Street, merely corrected the clerical error that had occasioned the earlier omission of the notation. This rectification did not amend the zoning map any more than the error itself constituted a legislative amendment.

MOTION TO AFFIRM

Alternatively, Appellee Civitas moves to affirm the judgment of the Court of Appeals of the State of New York on the grounds that Parkview had no property in-

terest in the building permit and therefore suffered no deprivation of property without due process or, in the alternative, that even if Parkview had acquired a property interest, none of its rights to due process was violated.

A. *Parkview Acquired No Property Interest In The Building Permit*

In order to sustain a claim of deprivation of property without due process, Parkview must first establish that it had acquired a protected property interest. *Board of Regents of State Colleges v. Roth,* 408 U.S. 548, 570-71 (1972); *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 538 (1985); *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 161 (1980).

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has *already acquired* in specific benefits. . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Roth, 408 U.S. at 576, 577 (emphasis added).

Property interests are created and defined not by federal constitutional law but rather "by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth,* 408 U.S. at 577; *Loudermill,* 470 U.S. at 588. Once the underlying substantive interest is defined by reference to state law, then "federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the

Due Process Clause." *Memphis Light, Gas and Water Division v. Craft,* 436 U.S. 1, 9 (1978).

While a state cannot rely on a "fiction" that there is no property interest in order to deprive a person of constitutional rights, a genuine lack of entitlement is sufficient to defeat a claim of deprivation of property without due process. Consequently, if state law does not create a legitimate claim of entitlement to a benefit, it is no fiction that there is no property interest.

B. *Under New York Law, a Building Permit Issued For a Noncomplying Building Is Invalid.*

The existence of a due process claim arising from the implementation of zoning laws and building permitting requirements depends, as it does in all other areas of the law, on the existence of an ascertainable, already-acquired property interest. It is undisputed that, in order to undertake construction in New York City, a builder must obtain a building permit, which will be issued when all permit requirements have been met. Administrative Code of City of New York §27-191. The Department of Buildings has no discretion to issue a building permit in response to an application that fails to conform to applicable provisions of law.

And, of particular importance in this context, the Administrative Code explicitly provides for the revocation of a permit that fails to comply with applicable laws and regulations, or "whenever any permit has been issued in error and conditions are such that a permit should not have been issued." Administrative Code of the City of New York §27-197. New York City's procedures are, of course, in accordance with the general rule in New York State. *See Jayne Estates, Inc. v. Raynor,* 22 N.Y.2d 417

(1968); *Reichenbach v. Windward at Southampton,* 80 Misc. 2d 1031 (Sup. Ct. Suffolk Co.), *aff'd,* 48 A.D.2d 909 (2d Dep't 1975), *app. dism.,* 38 N.Y.2d 912 (1976); *see also Parkview,* 71 N.Y.2d at 281. In other words, no legitimate claim of entitlement can be created before the issuance of a valid permit that complies with the zoning regulations.

Parkview's permit has never complied with the applicable zoning requirements: at all relevant times, the PI District boundary was 150 feet east of Park Avenue, and the 31-story portion of the building extending 60 feet into that District has therefore always violated the height restrictions imposed by the zoning regulations. Because Parkview's permit was never valid, Parkview never acquired a property interest in the permit.

C. *It Has Long Been The Law In New York State That a Municipality Cannot Be Estopped From Revoking An Invalid Permit.*

An invalid, erroneously issued permit cannot become valid merely because the recipient of the permit relies on it. Under well established and uniformly applied precedent, New York State does not permit a municipality to be estopped from enforcing a zoning ordinance simply because a developer was able to obtain a building permit, when the permit was unlawful when issued. For this reason as well, there is no property interest in an invalid permit.

The general rule in New York is that a municipality, in exercising its governmental functions, may not be estopped by its conduct. *E.g., E.F.S. Ventures Corp. v. Foster,* 71 N.Y.2d 359, 370 (1988) (decided with *Parkview*); *Scruggs-Leftwich v. Rivercross Tenants' Corp.,* 70

N.Y.2d 949 (1987); *Daleview Nursing Home v. Axelrod,* 62 N.Y.2d 30 (1984); *Hamptons Hospital and Medical Center v. Moore,* 52 N.Y.2d 88 (1981). This rule against estoppel of the government is firmly rooted in the strong policies of protecting the government's sovereign immunity, of separation of powers, and of protecting the public from fraud. *Daleview,* 62 N.Y.2d at 34. Consistent with these policies, the New York courts have repeatedly refused to allow estoppel against a government in order to ratify administrative action contrary to statute. *See, e.g., Morley v. Arricale,* 66 N.Y.2d 665 (1985); *Albert Simon v. Meyerson,* 36 N.Y.2d 300, *app. dism.,* 423 U.S. 908 (1975) (City of New York not bound by Commissioner's original approval and licensing of certain gaming devices in enforcing prohibition against such devices).[10]

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10. In its Jurisdictional Statement, at 25, Parkview alludes to an exception to the prohibition against estoppel, apparently permitted in some jurisdictions when a municipal employee makes a reasonable but erroneous interpretation of an ambiguous law. Although lower courts have referred to such an exception, *see, e.g., Reichenbach v. Windward at Southampton,* 80 Misc. 2d 1031, *aff'd.,* 48 A.D.2d 909 (2d Dep't 1975), (adopting opinion of Sup. Ct. Suffolk Co.), *app. dism.,* 38 N.Y.2d 912 (1976) (relying on *Jantausch v. Borough of Verona,* 41 N.J. Super. 89, 124 A.2d 14, 16-17 (1956), *aff'd,* 24 N.J. 326, 131 A.2d 881 (1957)), the Court of Appeals has never recognized it. Furthermore, even if New York did recognize this exception for a "reasonable but erroneous" interpretation of a zoning ordinance, such an exception would be inapplicable here. This case involves neither an ambiguous statute nor an "interpretation" as that word is usually understood. To define "interpretation" so broadly as to include any reading of a map or page of text would vitiate the purpose of the exception. The dispute here is not about whether the map was read correctly but whether, when read correctly, it accurately represents the law. There is therefore no "interpretation," whether reasonable or not, that would justify the application of this doctrine, if it were to exist under New York law.

Prior to the present case, the Court of Appeals had already applied the principle that an erroneous action by a municipal employee may not estop the government from enforcing its laws to reject precisely the state law claim advanced by Parkview. In *City of Yonkers v. Rentways, Inc.*, 304 N.Y. 499 (1952), a decision on which the Court of Appeals relied in this case, *Parkview*, 71 N.Y.2d at 282, the court expressly considered and rejected the assertion that the improper issuance of a building permit for a prohibited use might estop a municipality from enforcing the use prohibition of its zoning resolution, holding that the City was not estopped from enforcing its zoning laws either by the issuance of the permit or by laches. 304 N.Y. at 504-05. *Accord, B&G Construction Corp. v. Board of Appeals*, 100 N.Y. 700, 703 (1955) (mem.); *City of Buffalo v. Roadway Tr. Co.*, 303 N.Y. 453 (1952).[11]

The lower courts in New York have generally reaffirmed and applied the rule articulated in *Rentways* that estoppel against enforcement of a zoning resolution may not be based upon the erroneous issuance of a building permit. *See Smith v. City of Albany*, 115 A.D.2d 825 (3d Dep't 1985); *Albert v. Board of Standards and Appeals*, 89 A.D.2d 960 (2d Dep't 1982); *Village Green Condominium Corp. v. Nardecchia*, 85 A.D.2d 692 (2d Dep't 1981); *Reichenbach v. Windward at Southampton*, 80 Misc. 2d 1031 (Sup. Ct. Suffolk Co.), *aff'd*, 48 A.D.2d

11. In *Rentways*, a Yonkers city employee had issued a building permit for a commercial garage based upon plans that clearly indicated that the only second level entry to the garage was through a door opening onto an adjacent lot, zoned exclusively for residential use. The garage owner then built the structure and used the vacant, residentially zoned lot for ingress to and egress from the garage. When the City of Yonkers sought to enjoin the business use of the residential lot, the garage owner asserted that the City should be estopped by its previous issuance of a building permit contemplating such use. The court rejected that argument.

909 (2d Dep't 1975) (adopting opinion of Sup. Ct. Suffolk Co.), *app. dism.*, 38 N.Y.2d 912 (1976); *In re Van Wagner Advertising,* N.Y.L.J., July 16, 1986, p. 11, col. 1 (Sup. Ct. N.Y. Co. 1986).

Moreover, many other states as well espouse the doctrine that the erroneous issuance of a building permit does not estop a municipality from enforcing its zoning resolution to enjoin a structure built under such a permit. As one of the leading commentators on the law of zoning has stated, "Courts are in almost complete agreement that no estoppel against the enforcement of an ordinance can be invoked against a municipality when the claim is based upon a municipal officer's ultra vires act." 3 Rathkopf, The Law of Zoning and Planning §45.04 at 45-45; *see also* 4* *d.* §50.04[3] at 50-53 n.19 (1987 Supplement).[12] *Accord,*

12. Courts in the following 13 jurisdictions have rejected claims that a municipality is estopped from enforcing its zoning ordinance against a structure that was constructed under a permit issued in eror: Alabama (*Board of Zoning Adjustment v. Boykin,* 265 Ala. 504, 92 So.2d 906 (1957), California (*Markey v. Danville Warehouse & Lumber Co.*, 119 Cal. App. 2d 1, 259 P.2d 19 (Dist. Ct. App. 1953), Georgia (*Corey Outdoor Advertising v. Board of Zoning Adjustments,* 254 Ga. 221, 327 S.E.2d 178, *app. dismissed,* 474 U.S. 802 (1985)), Hawaii (*County of Kauai v. Pacific Standard Life Insurance Co.*, 165 Hawaii 318, 653 P.2d 766 (1982) *app. dismissed sub nom. Pacific Standard Life Ins. Co. v. Committee to Save Nokolii,* 460 U.S. 1077 (1983)), Iowa (*B&H Invest. Inc. v. Coralville,* 209 N.W.2d 115 (Iowa 1973)), Kentucky (*Holloway Ready Mix Company v. Monfort,* 474 S.W.2d 80 (Kentucky 1968)), Louisiana (*Pailet v. City of New Orleans,* 433 So.2d 1091 (La. App.) *cert. denied,* 440 So.2d 757 (La. 1983)), Massachusetts (*Ferrante v. Board of Appeals of Northampton,* 345 Mass. 158, 186 N.E.2d 471 (1962)), Minnesota (*Howard v. Roseville,* 244 Minn. 343, 70 N.W.2d 404 (1955)), Mississippi (*City of Jackson v. Kirkland,* 276 So.2d 654 (Miss. 1973)), Nevada (*Board of County Commissioners v. C.A.G., Inc.*, 98 Nev. 497, 654 P.2d 531 (1982), Washington (*Eastlake Community Council v. Roanoke Associates, Inc.*, 82 Wash.2d 475, 513 P.2d 36 (1973), and Wisconsin (*Milwaukee v. Leavitt,* 31 Wis. 72, 142 N.W.2d 169 (Wisc. 1966)).

6 A.L.R.2d 960 (1949 & 1985 Supp.).

Federal courts have applied this widespread state law doctrine that the issuance of an unlawful building permit does not prevent a municipality from revoking the invalid permit. In *Hynes v. Pasco County,* 801 F.2d 1269 (11th Cir. 1986) (per curiam), the Eleventh Circuit Court of Appeals affirmed the district court's dismissal, for failure to state a federal claim, of a constitutional due process challenge to the revocation of a building permit. As in this case, the permit obtained by the applicant had later been determined to have been in violation of the local zoning ordinance and therefore invalid when issued. In its terse per curiam opinion, the circuit court characterized the federal claim as an improper attempt by the plaintiff "to raise to constitutional level the normal operation of a zoning system," noting that "[t]he federal courts will not sit as a zoning review board." *Id.* at 1270. *See also Carolan v. City of Kansas City,* 813 F.2d 178 (8th Cir. 1987).

It is important to note that New York law distinguishes the present factual circumstances, which involve the revocation of a permit that was invalid when issued, from a situation in which the applicable zoning is amended after reliance upon the issuance of a permit that complied with the zoning regulations in effect prior to the amendment. In the latter case, state law does recognize a property interest in the permit. *See, e.g., Natchev v. Klein,* 41 N.Y.2d 833 (1977); *Jayne Estates,* 22 N.Y.2d 417; *Reichenbach,* 48 A.D.2d 909 (2d Dep't 1975), *app. dism.,* 38 N.Y.2d 912 (1976); *cf. also Wheeler v. City of Pleasant Grove,* 664 F.2d 99 (5th Cir. Unit B 1981), *cert. denied,* 456 U.S. 973 (1982) (distinguished in *Hynes*, 801 F.2d 1269). Indeed, this rule is codified in New York City by §11-33 of the Zoning Resolution. In this case, however, there was no change, legislative or otherwise, in the zoning

of Parkview's property after it obtained the building permit: the PI District boundary affecting its property was at all times 150 feet east of Park Avenue.

D. *Parkview's Assertion That The City Created a "Fiction" To Deprive it of its Property Interest Is Incorrect.*

The decisions of this Court that Parkview cites in an attempt to prove that the City has created a fiction to deprive it of its property interest are inapposite because they involved state statutes that, as the Court noted in each such case, by their terms established property interests. *See Memphis Light,* 436 U.S. 1 (statutory provision that utility permitted to terminate service only "for cause" created "legitimate claim of entitlement," *id.* at 11-12); *Loudermill,* 470 U.S. 532 (statute entitling classified civil service employees to retain their positions "during good behavior and efficient service" created "more than a unilateral expectation" regarding continued employment. *Id.* at 538). *Cf. also Webb's Fabulous Pharmacies,* 449 U.S. at 164 (holding, explicitly limited to "narrow circumstances" of case, that county's retaining interest on an interpleader fund when it already charged a clerk's fee "for services rendered" constituted taking of property without just compensation).

Nor does *Hodes v. Axelrod,* 70 N.Y.2d 364 (1987), support Parkview's argument that the City is relying on a fiction to justify its revocation of the building permit. Jurisdictional Statement at 24. First, *Hodes* concerns the vested rights doctrine, which upholds the finality of judgments in the face of subsequent legislation. 70 N.Y.2d at 370. The decision is therefore inapplicable to this case, which involves the relationship of existing legislation and an inadvertent, improper administrative action. Second,

although not relevant here because there was no retroactive change in the zoning, Parkview's use of the *Hodes* opinion is misleading: contrary to the sense of the passage that Parkview quoted, the decision actually recognizes the increasingly broad acceptance of the retroactivity of legislation.

E. *Charging Parkview with Knowledge of the Zoning Law Does Not Violate Due Process*

Parkview claims that charging it with knowledge of the PI District's boundaries somehow violates due process. This assertion, however, contravenes settled New York law and is inconsistent with the facts of this case. The law presumes that a building permit applicant has constructive knowledge of the current zoning regulations applicable to its property, *Rosenbush v. Keller,* 247 A.D. 248 (2d Dep't), *aff'd,* 271 N.Y. 282 (1936) (applicant held to have constructive if not actual knowledge of a zoning change adopted before permit approved), and the circumstances of this case suggest that Parkview should also be charged with knowledge of how much of its property remained within the PI District.[13]

First, there is no dispute that the loose-leaf version of Zoning Map 6b publicly available when Parkview purchased the property unequivocally indicated that the PI District extended 150 feet eastward from Park Avenue at 96th Street.

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13. In this regard, it is important to note that the issues of whether Parkview had actual knowledge or was proceeding in good faith were not litigated below. The Supreme Court, which held no fact-finding hearing, explicitly held it "unnecessary to consider the factual issues as to [Parkview's] good faith." Slip Opinion at 13, Jurisdictional Statement at 17a.

Second, the loose-leaf Map 6b upon which Parkview claims that it relied indicated by shading that the PI District extended farther east at 96th Street than the 100-foot boundary at 95th Street. While insufficient to establish conclusively the location of the boundary, this indication should have put Parkview on notice to verify the PI District boundary, especially in light of what it should have known about the property when it made the acquisition, based on the then current zoning map.

Finally, Parkview's architects examined the certified diagram prepared by the Department of City Planning in connection with the downzoning of the area adjacent to Parkview's property to an R8B district in 1985. As noted above, that diagram clearly indicated the 150-foot eastward reach of the PI District at 96th Street.

Parkview's arguments about the requirements with which a government must comply when it promulgates laws, Jurisdictional Statement at 17-18, are consistent with the presumption of constructive knowledge with which New York law and the circumstances of this case charge it. While *Texaco, Inc. v. Short,* 454 U.S. 516 (1982), affirms the proposition that "[g]enerally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comp[illegible]' *id.* at 532, neither this abstract proposition of black-letter law nor the holding of *Texaco* affords Parkview comfort in this case.

In *Texaco,* the Court upheld an Indiana statute that provided for the automatic lapse of severed mining interests that had remained inactive for twenty years, with a two-year grace period for interests that would otherwise lapse on the effective date of the statute, holding that the state legislature had complied with the constitutional pro-

cedural requirements in enacting this statute. The statute in *Texaco* was thus new legislation that extinguished clearly established property rights. In this case, there was no legislative change that affected Parkview's lot, and Parkview was not deprived of a property interest since its building permit was invalid when issued. In addition, the exception to the presumption of knowledge of applicable laws, on which Parkview relies to justify its claimed ignorance of the correct boundary of the PI District at 96th Street, Jurisdictional Statement at 17, is neither part of the Court's opinion in *Texaco* nor applicable to this case.[14] Parkview has thus failed to show any way in which the City violated its due process rights.

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14. That exception, discussed only by the dissent in *Texaco*, is based on *Lambert v. California*, 355 U.S. 225 (1957), which concerned a municipal ordinance that made it an offense for any convicted felon to remain in the city of Los Angeles for more than five days without registering with the police. The Court held the ordinance unconstitutional because it deprived of his liberty a person who neither knew nor could reasonably be expected to know of his legal obligation. This exception is irrelevant not only to the holding in *Texaco* but also to the circumstances of this case.

CONCLUSION

Wherefore, Appellee Civitas Citizens, Inc. respectfully submits that the federal question upon which this cause depends is so insubstantial as not to need further argument, and moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeals of the State of New York.

July 11, 1988

Respectfully submitted,

ROBERT S. DAVIS
BERLE, KASS & CASE
Counsel for Appellee
Civitas Citizens, Inc.
45 Rockefeller Plaza
New York, NY 10111
(212) 765-1800

Of Counsel:
FLORENCE A. FREDMAN